IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.04.2007

Coram

The Honourable Mrs.Justice PRABHA SRIDEVAN

S.A.No.2006 of 2003

and

CMP.No.18309 of 2003

D.Arumuga Nadar ..Appellant
(2nd Defendant)

-vs-

1. K.Muthulakshmi
2.P.Kandaswamy ...Respondents
(Plaintiff and ISt Defendant)

Second Appeal against the judgment decree of the learned 4th Additional Judge, City Civil Court, Chennai dated 17.7.2003 made in A.S.No. 134/01 reversing that of the learned 16th Assistant City Civil Judge, Chennai dated 21.3.2000 made in O.S.No.6778/93.

For Appellant : Mr.R.Subramanian
For Respondent -1 : Mr.S.Jayaram, Senior counsel
for Mr.Y.K.Rajagopal.

JUDGMENT

The following substantial questions of law were framed at the time of admission:-

(i) Whether the Lower Appellate Court was right in holding that the rule of estoppel embodied in Section 41 of the Transfer of Property Act will not apply to the present case?

(ii) Whether the Lower Appellate Court was right in holding that the principles of caveat emptor will preclude the appellant from seeking protection under Section 41 of the Transfer of Property Act?

(iii) Whether the Lower Appellate Court was right in holding that the claim of the appellant, that he became a lessee under the

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second respondent only will prevent him from claiming that the conduct of the first respondent will prevent her from suing for possession?

(iv) Whether the Lower Appellate Court was right in holding that the precedents cited by the appellant will not apply to a case of a lease?

2. The appellant who is the defendant resists the suit for recovery of possession on the ground that the husband of the respondent had leased the property to him and allowed him to construct the superstructure and the respondent had acquiesced with the same. The respondent's case that there was no acquiescence has been accepted by the lower Court.

3. The respondent owns the suit property by virtue of the settlement deed document No.3994/1974 dated 30-09-1974 by which her sister had settled the property on her. She has been the Matron in the Air-force and has been posted away from Madras for several years. Taking advantage of her absence the second respondent, her husband had leased out the property without authority to the appellant. Since the first respondent has not permitted such lease, the appellant's presence is that of a trespasser. The appellant had also obtained electricity connection illegally. The first respondent had issued notice to the Commissioner Corporation and other officials that there should be no mutation of records in favour of the appellant. To her letter written to the Electricity Board she received a reply that there has been a decision in O.S.No.684 of 1988 that the appellant is the lawful tenant in respect of the suit property. It is only thereafter that the first respondent came to know about some arrangement between the appellant and the second respondent. The first respondent came to understand from the records in that suit that a decree for injunction has been passed against the second respondent her husband. The alleged document of lease was not produced. Any arrangement between the appellant and the second respondent will not bind the first respondent and therefore, the suit was filed for declaration and recovery of possession. After issuing a notice on 08-04-1992 to which a reply was given b the appellant on 24-05-1992. The second respondent remained ex-parte. The appellant resisted the suit mainly denying the title of the first respondent in the suit property. According to the appellant he had no knowledge of the alleged settlement dated 13-09-1974. According to the appellant, the first respondent had never enjoyed the suit property and had no right to the same. The second respondent had denied that the first respondent was employed in the Air-Force and that taking advantage of her absence the second respondent had leased out the property to the appellant. The first respondent is

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fully aware of the construction of the superstructure by the appellant. The appellant is not a trespasser but a lawful tenant. When the second respondent admitted to throw out the appellant, he filed O.S.No.624 of 1978 and a decree for injunction was granted in his favour. Against that, the second respondent filed O.S.No.370 of 1991, which was dismissed. After realising that it was not possible the appellant/the first respondent by abusing the process of law had filed the present suit. All the other allegations in the plaint were denied. The Trial Court dismissed the suit holding that the appellant is a tenant and the first respondent is not entitled to recover possession. The aggrieved first respondent filed the appeal. In the appeal, the first respondent's title to the suit property was declared and the suit was decreed as prayed for and now the second defendant in the suit who claims to be the tenant under the first respondent's husband has filed this appeal.

4. The learned counsel for the appellant submitted that this is a case where the conduct of the parties would clearly establish that the first respondent herein knew fully well that her husband had leased out the property to the appellant herein. In fact, that has even been pleaded in the plaint. Thereafter, the respondents attempted to throw the appellant out. A suit was filed, followed by an appeal and both in the suit and appeal, the husband/first respondent lost. The finding is that the super structure on the property was put up only by the appellant. After having failed, the second respondent had chosen to file a suit for declaration of title and recovery of possession.

5. The learned counsel for the appellant would submit that in 1988, the respondent had given a complaint objecting to the construction put up by the appellant and for five years, there was silence and only thereafter, the suit was filed. The respondent was waiting in the wings to see the outcome of the suit filed by the husband and only when she knew that the suit met with failure, she filed her suit. Learned counsel submitted that it is hardly believable that the first respondent would not have known about the proceedings initiated by the husband when it has been proved by documentary and oral evidence that the husband and the wife live together in the suit property. The learned counsel submitted that the finding of the lower court with regard to Section 41 of the Transfer of Property Act was totally erroneous.

6. The learned counsel also submitted that the court ought to have seen the effect of the judgment obtained by the appellant against the husband of the respondent. The learned counsel relied on the following decisions

(a) In 1993 (4) SCC 349 (GURU AMARJIT SINGH v. RATTAN CHAND), wherein the Supreme Court dealt with the circumstances in which Section 111 (g)(1) Transfer of Property Act would apply;

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(b) In AIR 1965 MADRAS 318 (ACC LTD v. RAMAKRISHNA), where the Division Bench of this Court, applying the doctrine of equitable estoppel, held that the owner is estopped from recovering possession because of his conduct and is not entitled to damages for the portion occupied by trespasser.

(c) In AIR 1981 MADRAS 220 (R.S.MUTHUSWAMI GOUNDER v. A.ANNAMALAI), it was held that the plaintiff could have come to know in time about the defendant putting up construction on the suit land, had he cared to find out and the principle of acquiescence would applied and plaintiff was therefore entitled only to a decree for compensation.

(d) In AIR 1977 MADRAS 342 (S.PALANIVELU v. K.VERADAMMAL), it was held that there was construction by a trespasser and acquiescence by owner while the trespasser built on the trespassed land and it was held that owner shall be compensated for the value of the trespassed portion.

(e) In 1957 (II) MLJ 603, (KUTTAPPA NAIR v. KUTTISANKARAN NAIR), it has been held that the equitable doctrine of estoppel embodied in Section 41 of the Transfer of Property Act would apply.

(f) In AIR 1979 SUPREME COURT 553 (SYED ABDUL KHADER v. RAMI REDDY), it was held that Section 41 of the Transfer of Property Act provides that where with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it.

(g) In AIR 1999 MAD 435 (S.GOVINDARASU UDAYAR v. PATTU), admissibility of judgments not inter partes was considered.

7. The learned senior counsel appearing for the respondent would submit that in the case on hand, no interference is warranted in the second appeal. The learned counsel submitted that even assuming without admitting that the appellant did not know that the second respondent was the real owner of the property, as soon as the notice Ex.A30, which is dated 28.4.92 was issued, the appellant ought to have known who was the real owner and since it was a case of total denial, it is not open to him now to invoke Section 41 of the Transfer of Property Act or say that the husband had, with the consent and authority of the first respondent, implied or express, inducted the appellant as a lessee in the suit property. The learned senior counsel submitted that the respondent had proved her title and therefore, she is entitled for possession.

8. The trial court dismissed the suit and aggrieved, the first respondent filed an appeal and succeeded. The prayer is for declaration of title. The learned counsel for the respondents relied on Ex.A1, which is the settlement deed dated 30.9.74. The first respondent has given evidence as P.W.1. She has stated that her sister had settled the property on her as per Ex.A1. According

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to her, she had served at various places in the Army from 27.2.63 to 24.5.94 and she had marked Ex.A13 to show the places where she had served. The appellant entered possession on 18.1.88. She had given a complaint and she had also given a complaint to the Commanding Officer, Ex.A3. There was no licence for running a firewood shop and again, in the letters to the Electricity Board under Ex.A8 to A11, it was pleaded that electricity connection should not be given. According to her, as she had been serving in various places, she could not immediately file a suit for recovery of possession. On consideration of oral and documentary evidence, the Appellate Court came to the conclusion that the suit property belonged to the first respondent.

9. The next question is whether she is entitled to recovery of possession. The learned counsel for the appellant relied on the various judgments wherein the principle of acquiescance was applied to deny the relief of possession and compensation was awarded. But in this case, the appellant himself has stated that the respondent was nowhere in the picture and had never seen her. In Ex.A31, which is the reply to Ex.A30, the following the sentences from Ex.A31 are relied :

> ".... In the first instance he wish to bring to your notice that at no time he became a tenant under your client. He has not at all seen a lady with name Muthulakshmi alleged to be the owner of the land wherein my client has put up superstructure at his own cost .....
>
> While that is so my client is not able to understand who is the said Muthulakshmi for whom you have issued the notice.
>
> As already stated, my client has nothing to do with your client. Hence, the question of vacating and handing over vacant possession of your client nor payment of Rs.750/- per month does not arise. "

So according to him, he had never seen the defendant. The appellant D.W.1 in his evidence stated as follows :-

> " .... முதல் பிரதிவாதி தாவா சொத்தில் உரிமை இல்லை என்றும், எனவே வாடகைதாரரை அனுமதிக்க அவர்க்கு அதிகாரம் இல்லை என்பது சரியல்ல ..... தாவா சொத்து வாதிக்கு சொந்தம் என்பதும் அதிலிருந்து தான் வெளியேறனும் என்று கூறுவது சரியல்ல .....
>
> தாவா இடத்திற்கு 1979ம் வருடம் கந்தசாமி (டி1) அனுமதியுடன் வந்தேன். வாதி எனக்கு அனுமதிக்கவில்லை .....

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தாவா இடம் வாதிக்கு எக்சிபிட் ஏ1 மூலம் சொந்தம் என்பது தெரியாது ..... வாதி சென்னையிலேயே இல்லை என்பது சரியல்ல. வாதி மதராஸில் வேலைப் பார்த்தது தெரியாது ..... தாவா இடம் வாதிக்கு சொந்தம் என்பது சரியல்ல. வாதி அனுபவித்த தாவா இடம் இருந்தது என்பது சரியல்ல. "

10. Except for one sentence where he had stated, "வாதி பலதடவை வாடகை வசூலித்திருக்கிறார்", the case of the appellant herein is one of total denial of the first respondent's right. The learned counsel for the appellant would vehemently argue that this is not a case where there can be a forfeiture of the lease by denial of title since the plaintiff had filed a suit alleging that he was a trespasser. The documentary and oral evidence extracted above would go against the appellant not in the context of forfeiture of lease, but because this clearly goes to show that the appellant cannot invoke the principle of implied authority. It is now his case that the real owner, viz., the first respondent had consented to her husband leasing out the property to the appellant. Then he would first have to admit that it is the first respondent who is the owner of the property, if he has to succeed on the ground that the first respondent being a real owner had acquiseced to his construction of the superstructure. Then he will not only have to admit that the first respondent is the real owner, but also that she had seen the superstructure come up and had not lifted her little finger. Whereas this is a case where he claims he has never seen the lady, namely Muthulakshmi and she has never been in Madras. The first respondent's stand is she has all along objected to the appellant's continuance in possession. While that is so, it is clear that even if he had pleaded that the first respondent had acquiesced, he has not proved the same because his oral evidence goes against that stand. Though in the written statement he has stated that the first respondent is fully aware that the land has been leased out to this defendant, in para 10, he had stated that the plaintiff is not entitled to get possession from the defendant as she has nothing to do with the suit property.

11. The learned counsel for the appellant would submit that para 10 should be construed to mean that she has nothing to do with his character as a tenant. It is difficult to place this construction on the pleading. When it is a case that she is not entitled to get possession, it only means that he denies that she is the owner of the property and therefore not entitled to get possession. Though there were pleadings in the written statement and in the additional written statement that she was aware of the construction, in the face of his oral evidence that she was not the owner and had never seen her, this would destroy his case of acquiescence and implied consent.

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12. In P. John Chandy and Co. (P) Ltd. v. John P. Thomas, (2002) 5 SCC 90 , at page 97 as regards acquiesence it is held that, "inaction in every case does not necessarily lead to an inference of implied consent or acquiescence. .... To establish implied consent there has to be something more than mere inaction or lack of initiative on the part of the landlord."

13. In Canara Bank v. Canara Sales Corpn., (1987) 2 SCC 666 , at page 677 the Supreme Court held,

"In order to sustain a plea of acquiescence, it is necessary to prove that the party against whom the said plea is raised, had remained silent about the matter regarding which the plea of acquiescence is raised, even after knowing the truth of the matter."

14. In Suraj Rattan Thirani v. Azamabad Tea Co. Ltd.,(1964) 6 SCR 192, it is held, "In order that Section 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make a transfer."

15. In Gurbaksh Singh v. Nikka Singh,1963 Supp (1) SCR 55, the Supreme Court held, "The general rule is that a person cannot confer a better title than he has. This section is an exception to that rule. Being an exception the onus certainly is on the transferee to show that the transferor was the ostensible owner of the property and that he had, after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good faith. In this case the facts are tell-tale and they establish beyond doubt that the appellant had the knowledge that the title of his transferor was in dispute and he had taken a risk in purchasing the same."

16. Section 41 of the Transfer of Property Act reads thus: “Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

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17. In the above circumstances, the judgment obtained by the husband is also of not of any use to the appellant. Whatever the husband might have done, the appellant was not able to prove that it was done with the implied authority or consent of the first respondent. The first respondent has established the title and it is not correct to state that the lower appellate court had on a wrong appreciation of Section 41, had come to its conclusion. A reading of the judgment of the Appellate Court shows that it had rejected the plea of the appellant that the lease was created by the husband of the first respondent with her consent.

18. In these circumstances, none of the substantial questions of law arise for consideration. Hence, the second appeal is dismissed. No costs. Connected CMP is closed.

19. The learned counsel for the appellant prays for time to handover possession of the property. The appellant shall file an undertaking to the effect that he will hand over possession on or before October 23, 2007, i.e., within a period of six months from this date and that he will not create any further encumbrance or a third party interest in the suit property. This undertaking shall be filed into the court on the reopening day, i.e. on 4.6.2007, after serving a copy thereof to the first respondent. On such filing of the undertaking, the first respondent shall not be entitled to execute the decree till the expiry of the above said period and if no such undertaking is filed, the respondent will be entitled to act as per law.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The 4th Additional Judge, City Civil Court, Chennai

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2. The 16th Assistant City Civil Judge, Chennai

3. The Registrar
City Civil Court, Chennai.

4. The Record Keeper
VR Section, High Court, Madras

2 ccs to Mr.Y.K.Rajagopal, Advocate, Sr. 27870

S.A.No.2006 of 2003

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